

To: CN=Nancy Stoner/OU=DC/O=USEPA/C=US@EPA[]
Cc: CN=Ken Kopocis/OU=DC/O=USEPA/C=US@EPA;CN=Bob Sussman/OU=DC/O=USEPA/C=US@EPA[]; N=Bob Sussman/OU=DC/O=USEPA/C=US@EPA[]
From: CN=Gregory Peck/OU=DC/O=USEPA/C=US
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EPA Appeals Mine Ruling

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EPA is asking a federal appellate court to reverse a controversial district court ruling seen as limiting when the agency may use its Clean Water Act (CWA) authority to block disposal sites from accepting dredge or fill material, including mining waste, authorized by Army Corps of Engineers' permits. The agency in a May 11 notice of appeal asked the U.S. Court of Appeals for the District of Columbia Circuit to review the lower court's finding that the agency was "not reasonable" in its novel attempt to use its veto authority to withdraw disposal sites for a mountaintop mine permit that the Corps had already finalized.

In her March 23 ruling in *Mingo Logan v. EPA*, Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia found that the Obama EPA exceeded its so-called veto authority in its Sept. 3, 2009, decision to withdraw approval for certain areas as disposal sites in a 2007 Corps permit issued to Mingo Logan during the Bush administration.

The ruling overturned EPA's 2009 veto for two disposal sites at Spruce No. 1 mine in a permit held by Mingo Logan – a West Virginia subsidiary of Arch Coal.

EPA has authority under CWA section 404(c) to declare areas off limits as sites for disposal of dredge or fill material, including mining waste, authorized under permits issued by the Corps. EPA has invoked this so-called veto authority less than 15 times in its history, but Mingo represents the only time it has ever vetoed sites that underlay a final permit.

The district court's ruling was seen as restricting when the agency may use its 404(c) authority before the Corps issues a final permit, an issue which EPA sought to avoid by urging the court to focus narrowly on the merits of its decision in this case rather than a broad review of the agency's legal authority. That could limit the agency's ability to veto the Pebble Mine project – a massive hardrock mine planned for Bristol Bay, AK – that environmentalists and others want the agency to block before construction begins.

In a strongly worded 34-page opinion, Jackson wrote that EPA's view of its 404(c) authority contradicts clear provisions in the CWA stating that compliance with the water law is measured by whether a company complies with a valid permit -- impossible in Mingo because EPA's veto renders an otherwise valid permit unusable.

Jackson wrote that the agency's interpretation of its 404(c) authority is "illogical and impractical" because it lacks authority to revoke an entire permit, yet attorneys for EPA could not outline how the company should proceed with a lawful permit where the disposal sites have been withdrawn.

"Not only is this non-revocation revocation logistically complicated, but the possibility that it could happen would leave permittees in the untenable position of being unable to rely upon the sole statutory touchstone for measuring their Clean Water Act compliance: the permit," the opinion said, referring to the agency's actions as "resorting to magical thinking."

But during a May 3 American Law Institute-Continuing Legal Education (ALI-CLE) conference, "Wetlands Law and Regulation," Lance Wood, assistant chief counsel of the Corps' environmental law and regulatory programs, voiced disagreement with the court's decision.

Speaking as an individual and not on behalf of the Corps, Wood said, the court is "dead wrong on the law" because the statutory language gives EPA's authority to "prohibit or withdraw" specification of disposal sites, indicating that Congress intended the agency to be able to pull sites once specified in a permit.

Environmentalists, who filed amicus briefs in the district court suit, are already lauding EPA's decision to

appeal the ruling, saying the litigation in the lower court was an “attack on EPA’s science-based veto decision.”

In a May 14 press release, environmental groups Earthjustice, Appalachian Mountain Advocates, West Virginia Highlands Conservancy, Sierra Club and others urge EPA to continue using and defending its “full authority” under the CWA in its oversight of mountaintop mining in Appalachia -- a priority of this administration.

“We are heartened to see the Environmental Protection Agency press forward in its commitment to enforce the 40-year-old Clean Water Act and to ensure that the full protections of that law are finally brought to Appalachia, where they’ve been ignored for too long,” the groups say in the press release. “As EPA’s Spruce veto determination recognized, sound science shows that it is unacceptable for a coal company to destroy more than 2,000 mountain acres and fill over six miles of vital streams with mining waste pollution, and we will continue standing behind EPA’s decision to prevent the irreversible devastation to waterways and communities that the Spruce No. 1 mine would bring.”

Gregory E. Peck
Chief of Staff
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

202-564-5778